

MEMORANDUM OF UNDERSTANDING
Between
CALIFORNIA DEPARTMENT OF TRANSPORTATION,
CALIFORNIA DEPARTMENT OF FISH AND GAME,
U.S. ARMY CORPS OF ENGINEERS, SOUTH PACIFIC DIVISION, U.S.
ENVIRONMENTAL PROTECTION AGENCY,
U.S. FISH AND WILDLIFE SERVICE, and the NATIONAL MARINE
FISHERIES SERVICE
REGARDING ESTABLISHMENT OF
STATEWIDE ADVANCE MITIGATION INITIATIVE
FOR
CALIFORNIA DEPARTMENT OF TRANSPORTATION PROJECTS
THROUGHOUT THE STATE OF CALIFORNIA

This Memorandum of Understanding ("MOU") is entered into by the California Department of Transportation ("Caltrans"), California Department of Fish and Game ("CDFG"), U.S. Army Corps of Engineers, South Pacific Division ("Corps"), the U.S. Environmental Protection Agency ("EPA"), U.S. Fish and Wildlife Service ("FWS"), and the National Marine Fisheries Service (NMFS) collectively referred to herein as the "Participating Agencies."

RECITALS

WHEREAS, it is the mission of Caltrans to provide mobility across California; and

WHEREAS, it is the mission of the Corps' Regulatory Program (33 C.F.R. Parts 320-332) to protect the Nation's aquatic resources, while allowing reasonable development through fair, flexible and balanced permit decisions; and

WHEREAS, the Corps is responsible for the administration of laws for the protection and preservation of aquatic resources pursuant to section 10 of the Rivers and Harbors Act of 1899 ("RHA") and section 404 of the Clean Water Act of 1972, as amended ("CWA"). Pursuant to the RHA, all work or structures in or affecting the course, condition, or capacity of "navigable waters of the U.S." require Corps authorization. The Corps authorizes, under the CWA, the discharge of dredged or fill material into "waters of the U.S.," including wetlands.

WHEREAS, EPA regulations at 40 C.F.R. Part 230 and Corps regulations at 33 C.F.R. § 332.1 require an applicant for a CWA section 404 permit to take all appropriate and practicable steps to first avoid and then minimize adverse impacts to the aquatic ecosystem before considering compensatory mitigation to offset unavoidable adverse impacts to waters of the U.S.. Pursuant to a Memorandum of Agreement between the EPA and the Department of the Army (August 11, 1992), EPA has certain review, elevation, and, potentially, veto obligations for permits issued by the Corps under CWA Section 404. The EPA also has review authority of proposed actions of other federal agencies in accordance with the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321-4370f, Council on Environmental Quality regulations (40 CFR Parts 1500-1508)

and Section 309 of the Clean Air Act, 42 U.S.C. § 7609. The EPA may recommend corrective and/or mitigation measures to reduce environmental impacts from proposed actions; and

WHEREAS, the FWS, an agency within the U.S. Department of the Interior, has jurisdiction over the conservation, protection, restoration and management of fish, wildlife, native plants, and the habitat necessary for biologically sustainable populations of these species within the U.S. pursuant to the federal Endangered Species Act ("ESA"), 16 U.S.C. §1531, *et seq.*, the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c, the Fish and Wildlife Act of 1956, 16 U.S.C. § 742(f), *et seq.*, and other provisions of federal law; and

WHEREAS, it is the mission of the NMFS, under the U.S. Department of Commerce, to provide for the stewardship of living marine resources, including anadromous species, through science-based conservation and management and the promotion of healthy ecosystems;

WHEREAS, the NMFS is responsible for the administration of laws for the protection and preservation of trust species pursuant to the federal ESA, 16 U.S.C. §1531, *et seq.*, the Magnuson-Stevens Act, the Marine Mammal Protection Act and other provisions of federal law to fulfill its mission of promoting healthy ecosystems;

WHEREAS, the CDFG has jurisdiction over the conservation, protection, and management of fish, wildlife, native plants and the habitat necessary for biologically sustainable populations of those species pursuant to California Fish and Game Code §1802; and

WHEREAS, it is the State of California's wetland conservation policy ('No Net Loss' policy; Executive Order W-59-93) to ensure no overall net loss and achieve a long-term net gain in the quantity, quality, and permanence of wetland acreage and values in California in a manner that fosters creativity, stewardship, and respect for private property, reduces procedural complexity in the administration of State and federal wetlands conservation programs, and encourages partnerships to make landowner incentive programs and cooperative planning efforts the primary focus of wetlands conservation and restoration; and

WHEREAS, it is the goal of the federal wetlands policy (1988, as amended) to achieve no overall net loss of the Nation's remaining wetlands resource base, and a long-term goal to increase the quality and quantity of the Nation's wetlands; and

WHEREAS, Caltrans, on behalf of the State of California and the Federal Highway Administration, operates, maintains and improves thousands of miles of highways and provides assistance to local governments with similar transportation infrastructure; and

WHEREAS, Caltrans selects projects to construct using State only funds or with Federal assistance under the Federal-aid Highway Program (23 U.S.C § 145), which may have unavoidable impacts to regulated natural resources, which are offset through avoidance

and minimization of impacts and establishment, restoration, and/or enhancement of similar regulated natural resources; and

WHEREAS, section 6001 and 6002 of the Safe, Accountable, Flexible, Efficient, Transportation Equity Act- A Legacy for Users (P.L. 109-59) require Caltrans, pursuant to its delegated authority, to undertake specific project development and coordination procedures that provide for advance transportation planning and early agency input; and

WHEREAS, considering biological conservation and mitigation needs early in a project's timeline, prior to project design and development, can reduce costs and allow natural resources conservation and mitigation to enhance the sustainability of those natural resource systems; and

WHEREAS, long-range advance mitigation and conservation planning would allow Caltrans to anticipate potential mitigation and conservation needs for planned transportation projects and to meet those needs in a more timely and cost-efficient way; and

WHEREAS, advance mitigation and conservation planning would allow mitigation funding for transportation projects to be directed to agreed-upon conservation priorities and would allow for the establishment, enhancement, preservation, and/or restoration, as appropriate, of habitat reserves that enhance the sustainability of natural systems by protecting or restoring connectivity of natural communities consistent with, but not limited to the ESA §7(a)(1), California Fish and Game Code §2055, RHA §10, and CWA §404 and §401; and

WHEREAS, working with state and federal resource protection and regulatory agencies Caltrans and CDFG intend to develop a preliminary plan for the Statewide Advance Mitigation Initiative (Initiative) in accordance with the authorities listed in Section II of this MOU.

THEREFORE, the Participating Agencies agree as follows:

I. PURPOSE.

A. This MOU is entered into by the Participating Agencies for the purpose of establishing a mutual framework for coordinated review concerning the development of an Initiative in California by Caltrans and CDFG for advance mitigation and conservation planning for planned transportation projects at a landscape scale. The Initiative may include establishment of mitigation banks, conservation banks, in-lieu fee programs, or other appropriate mitigation or conservation measures.

B. A coordinated and collaborative approach will aid in more rapid and comprehensive review, comment, and development of the Initiative. A clearly defined and widely recognized process for development and consideration of the Initiative for the purpose of offsetting unavoidable impacts associated with Caltrans' transportation projects will facilitate and accelerate the compensatory mitigation and conservation

planning process, simplify and clarify the process for Caltrans, save agency staff time, reduce the cost of evaluating a mitigation/conservation proposal, and simplify oversight of use and operation of the Initiative to assure compliance with the Participating Agencies' responsibilities.

C. It is the intent of the Participating Agencies that the objective of the Initiative is to provide advance mitigation/conservation measures at a landscape scale in advance of impacts. The preferred mitigation/conservation methods of this Initiative will be developed and considered for approval by the Participating Agencies, subject to the requirements of the authorities cited in Section II of this MOU.

II. AUTHORITIES.

The establishment of an Initiative for compensatory mitigation or conservation is governed by one or more of the following statutes, regulations, policies, and guidelines:

A. Federal

1. Clean Water Act (33 U.S.C. § 1251 *et seq.*);
2. Rivers and Harbors Act (33 U.S.C. § 403);
3. National Environmental Policy Act (42 U.S.C. § 4321 *et seq.*);
4. Endangered Species Act (16 U.S.C. § 1531 *et seq.*) ("ESA");
5. Fish and Wildlife Coordination Act (16 U.S.C. § 661 *et seq.*);
6. National Historic Preservation Act (16 U.S.C. § 470);
7. Magnuson-Stevens Fishery Conservation and Management Act (Public Law 94-265);
8. Executive Order 11990; Protection of Wetlands;
9. Executive Order 11988; Floodplain Management;
10. Regulatory Programs of the U.S. Army Corps of Engineers, Final Rule (33 C.F.R. Parts 320-332);
11. Guidelines for Specification of Disposal Sites for Dredged and Fill Material (40 C.F.R. Part 230);
12. Memorandum of Agreement between the Environmental Protection Agency and the Department of the Army concerning the Determination of Mitigation Under the Clean Water Act, § 404(b)(1) Guidelines (February 6, 1990);
13. Guidance for the Establishment, Use and Operation of Conservation Banks (U.S. Department of Interior Memorandum, dated May 2, 2003); and
14. USACE San Francisco District Public Notice 02-03, dated March 5, 2003, titled "Mitigation Bank Policy on the Santa Rosa Plain."
15. Memorandum of Understanding between the California Resources Agency, CDFG, USACE, USFWS, NMFS, EPA, and USDA Natural Resources Conservation Service concerning Mitigation and Conservation Banking in California.

B. State

1. California Environmental Quality Act ("CEQA") (Public Resources Code § 21000 *et seq.*) and State CEQA Guidelines (Tit. 14 Cal. Code Regs., Ch. 3);
2. California Endangered Species Act ("CESA") (Fish and Game Code § 2050 *et seq.*);
3. California Natural Community Conservation Planning ("NCCP") Act (Fish and Game Code § 2800 *et seq.*);
4. California State Office of Historical Preservation ("SHPO") (Public Resources Code § 5020 *et seq.*) Archaeological, Paleontological and Historical Sites (Public Resources Code § 5097 *et seq.*) Native American Historical, Cultural and Sacred Sites (Public Resources Code § 5097.9); and Historical Resources (Public Resources Code § 21084.1)
5. Conservation of Wildlife Resources (Fish and Game Code § 1800 *et seq.*).
6. Lake and Streambed Alteration Program (Fish and Wildlife Protection and Conservation, Fish and Game Code § 1600 *et seq.*)
7. Porter-Cologne Water Quality Control Act (California Water Code, Division 7)
8. Sacramento-San Joaquin Valley Wetlands Mitigation Bank Act of 1993 (Fish and Game Code § 1775 *et seq.*; 1784 *et seq.*; and 1790 *et seq.*);
9. California Native Plant Protection (Fish and Game Code § 1900-1913)
10. Official Policy on Conservation Banks, April 7, 1995, by California Resources Agency and California Environmental Protection Agency, jointly; and
11. Supplemental Policy Regarding Conservation Banks within the NCCP Area of Southern California, January 24, 1996, by U.S. Fish and Wildlife Service and California Department of Fish and Game.

III. **RESPONSIBILITIES.**

A. The CDFG and Caltrans, with funding and resources, intend to:

1. Coordinate to identify compensatory mitigation or conservation locations in California that may be suitable for establishment, restoration, and/or enhancement.
2. Commit staff and seek to develop a preliminary plan and develop the Initiative in accordance with the applicable laws, regulations, policies, and guidance of the Participating Agencies that will be considered for future approval.
3. Explore all appropriate compensatory mitigation and conservation planning options to mitigate the impacts of planned transportation projects consistent with applicable laws, regulations, policies, and guidance.

B. The Corps, EPA, FWS, and NMFS intend to:

1. Commit staff, as available, and to coordinate with CDFG and Caltrans on the development of an Initiative that promotes the advance mitigation and the conservation of nationally and regionally significant biological diversity.
2. Review and provide comments on any Initiative documents submitted by Caltrans and CDFG within timeframes mutually agreed upon by the Participating Agencies.

IV. GENERAL PROVISIONS. It is understood by the Participating Agencies that:

- A. This MOU does not authorize funding or services nor is it a legally binding contract. Any funding commitments or services will be handled in accordance with applicable laws, regulations, and procedures. Such endeavors, if any, will be covered by separate agreement(s) that shall be made in writing by representatives of the Participating Agencies and shall be independently authorized by appropriate statutory authority. This MOU does not provide such authority.
- B. Corps, EPA, FWS, NMFS, or CDFG participation in this MOU does not imply endorsement of Caltrans transportation projects nor does it diminish, modify, or otherwise affect Corps, EPA, FWS, NMFS, or CDFG statutory or regulatory authorities.
- C. This MOU neither expands nor is in derogation of those powers and authorities vested in the Participating Agencies by applicable laws, statutes, regulations, or Executive Orders, nor does it modify or supersede any other applicable interagency agreements existing as of the date of this MOU.
- D. This MOU may be modified or amended upon written request of any Participating Agency hereto and the subsequent written concurrence of all of the Participating Agencies.
- E. Participation in this MOU may be terminated, without cause, sixty days after a Participating Agency provides written notice of such termination to the other Participating Agencies.
- F. This MOU in no way restricts the Participating Agencies from participating with other public or private agencies, organizations, or individuals. The Participating Agencies recognize the importance of continuing cooperation and participation with non-governmental organizations and institutions in programs of mutual interest.
- G. This MOU is intended only to improve the cooperation among the Participating Agencies. It is not intended to, and does not create, any right, benefit, or trust responsibility, substantive or procedural, enforceable at law or in equity, by a party against the United States, its agencies, its officers, or any person.


H. This MOU does not in any manner affect statutory authorities and responsibilities of the Participating Agencies.

I. It is recognized by all Participating Agencies that the decision to issue any approval of the Initiative or approval or permit under relevant statutory authorities will remain in the sole discretion of the appropriate Participating Agencies. This MOU does not guarantee or assure approval of the Initiative or the issuance of any approval or permit required under applicable statutory authorities.

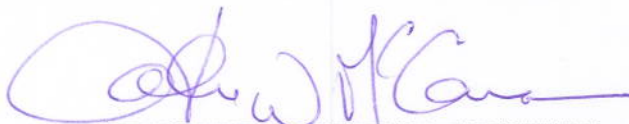
J. This MOU may be executed in several counterparts and all counterparts so executed shall constitute one MOU, notwithstanding that all of the Participating Agencies are not signatory to the original or the same counterpart.

V. **EFFECTIVE DATE AND DURATION**

This MOU is effective upon the date of the last signatory and will expire five years from that date unless extended or terminated earlier by mutual agreement of the Participating Agencies.


CINDY MCKIM
Director
California Department of Transportation

1/10/2011
Date


JOHN MCCAMMAN
Director
California Department of Fish and Game

1/26/11
Date

SCOTT F. "ROCK" DONAHUE, P.E.
Brigadier General, US Army
Commanding

Date

ALEXIS STRAUSS
Director, Water Division
U.S. Environmental Protection Agency, Region IX

Date

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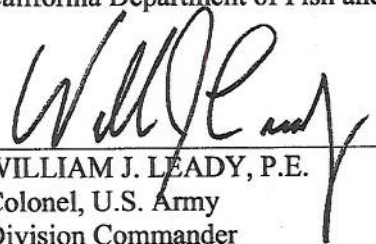
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CINDY McKIM
Director
California Department of Transportation

Date

JOHN MCCAMMAN
Director
California Department of Fish and Game

Date



WILLIAM J. LEADY, P.E.
Colonel, U.S. Army
Division Commander

17 FEB 2011

Date

ALEXIS STRAUSS
Director, Water Division
U.S. Environmental Protection Agency, Region IX

Date


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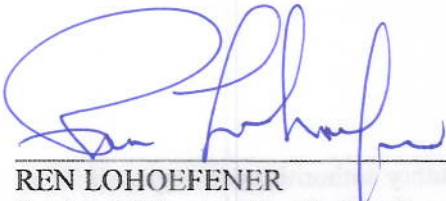
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SCOTT F. "ROCK" DONAHUE, P.E.
Brigadier General, US Army
Commanding

Date


ALEXIS STRAUSS
Director, Water Division
U.S. Environmental Protection Agency, Region IX

4 February 2011
Date



REN LOHOEFENER
Regional Director, Pacific Southwest Division
U.S. Fish and Wildlife Service

1.14.2011
Date

RODNEY MCINNIS
Regional Administrator
National Marine Fisheries Service

Date

REN LOHOEFENER
Regional Director, Pacific Southwest Division
U.S. Fish and Wildlife Service

Date

Rodney R. McInnis

RODNEY MCINNIS
Regional Administrator
National Marine Fisheries Service

2-7-11

Date